Supreme Court, U.S.
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89-1188

NO.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER 1989 TERM

JAMES C. KELLY,

Petitioner,

versus

S. RAY GILL, ETC., ET AL,

Respondents.

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PETITION FOR A WRIT OF CERTIORARI
TO THE FIFTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

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PETITION FOR WRIT OF CERTIORARI

JAMES C. KELLY, Pro Se
10135 W. Sunrise Blvd.
Apartment 101
Plantation, Florida 33322
(305) 467-4403

## QUESTIONS PRESENTED FOR REVIEW

I. WHETHER OR NOT THE STATE COURT OF APPEALS ERRED AS A MATTER OF FEDERAL LAW IN HOLDING THAT THE PLAINTIFF COULD NOT LITIGATE HIS CLAIM UNDER THE FEDERAL CIVIL RIGHTS ACT OF 1871, 42 U.S.C. SECTION 1983, IN STATE COURT BECAUSE THE STATE HAS SOVEREIGN IMMUNITY FROM PLAINTIFF'S ATTEMPT TO ENFORCE FEDERAL CIVIL RIGHTS REMEDIES IN STATE COURT?

II. WHETHER OR NOT THE STATE COURT OF APPEALS ERRED AS A MATTER OF FEDERAL LAW IN HOLDING THE FLORIDA STATUES §112.531 ET SEQ. AND §943.139 DO NOT CONTAIN ALL OF THE FEDERAL LAW REQUIREMENTS TO ESTABLISH A PROPERTY INTEREST IN EMPLOYMENT FOR THE LAW ENFORCEMENT OFFICERS DEFINED THEREIN AND FAILS TO PROVIDE THE LAW ENFORCEMENT OFFICERS DEFINED THEREIN WITH SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS?

III. WHETHER OR NOT THE STATE COURT OF APPEALS ERRED AS A MATTER OF FEDERAL LAW IN HOLDING THAT THE PLAINTIFF WAS NOT ENTITLED TO ALL OF THE BENEFITS AND PROTECTIONS AFFORDED BY FLORIDA STATUTES §112.531 ET. SEQ?

IV. WHETHER OR NOT THE STATE COURT OF APPEALS ERRED AS A MATTER OF FEDERAL LAW IN HOLDING THAT THE PLAINTIFF WAS NOT ENTITLED TO REASONABLE ATTORNEY FEES AND DAMAGES INCURRED AS A RESULT OF HIS WRONGFUL TERMINATION AND DENIAL OF DUE PROCESS RIGHTS UNDER FEDERAL AND STATE LAW?

## PARTIES TO PROCEEDING

The following were parties to the proceeding in the Fifth District Court of Appeal:

1. S. RAY GILL, in his official capacity as State Attorney for the Office of the State Attorney, Fifth Judicial Circuit in and for the State of Florida.

2. Office of the State Attorney, Fifth Judicial Circuit in and for the State of Florida.

3. Robert A. Butterworth, in his official capacity as Attorney General for the State of Florida.

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The Petitioner, JAMES C. KELLY, prays that a writ of certiorari issue to review the judgment of the Fifth District Court of Appeal of the State of Florida.

## OPINIONS BELOW

The Order of the Circuit Court of the Fifth Judicial Circuit of Florida, granting Summary Judgment is unrecorded and appears at page 12 of the Appendix herein.

The Order of the Fifth District Court of Appeal of the State of Florida entered on June 15, 1989, is recorded at 544 So.2d 1162 (Fla. App. 5 Dist. 1989), and appears at page 1 of the Appendix herein.

The Order of The Supreme Court of Florida entered on October 24, 1989, is unrecorded and appears at page 20 of the Appendix herein.

## JURISDICTION

The Final Judgment of the Fifth District Court of Appeal of the State of Florida is dated June 15, 1989.

The decision of the Fifth District Court of Appeal of the State of Florida was timely appealed to the Supreme Court of Florida. The Supreme Court of Florida denied discretionary review on October 24, 1989. This Petition for a Writ of Certiorari is filed timely within ninety (90) days thereof. The jurisdiction of this Honorable Court to review by certiorari is conferred by 28 U.S.C. Section 1257 and Rule 10 of this Honorable Court.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Federal Civil Rights Act of 1871, 42 U.S.C. Section 1983 reads in full:

> "Every person who, under color of any statutes, ordinance, regulation, custom , or usage, or any State or Territory or the District of Columbia, subject, or causes to be subjected, any citizen of the Unites States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statutes of the District of Columbia.

2. Fifth Amendment, United States Constitution.

3. Fourteenth Amendment, United States Constitution.

4. Article VI, Section 2, United States Constitution

5. Article VIII, Section 1(g) and 6(d), Florida Constitution, 1968.

6. §112.531 et seq., Florida Statutes (19856).

7. §943.139 (1) and (2), Florida Statutes (1985).

9. §110.205(c) and (k), Florida Statutes (1985)

10. §27.255 (1) and (3), Florida Statutes (1985).

11. §27.25 (1), Florida Statutes (1985).

12. §943.10 (3) and (4), Florida Statutes (1985).

13. §216.011(jj), Florida Statutes (1985).

14. §768.28, Florida Statutes (1985).

## STATEMENT OF THE CASE

The Plaintiff filed a 4 count suit against S. RAY GILL, in his official capacity as State Attorney for the office of the State Attorney, Fifth Judicial Circuit in and for the State of Florida and also against the office of the State Attorney.

Count 3 is an action filed pursuant to 42 U.S.C. Section 1983 (Hereinafter referred to as §1983) claiming violations of Plaintiff's constitutional rights to due process in termination from constitutionally protected employment as guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution.

Count I is an action filed pursuant to §112.531 et. seq. (1985) claiming wrongful termination for denial of procedural and substative due process

rights as provided by Florida and Federal law.

Count II is an action filed pursuant to §57.105, Florida Statutes (1985) claiming attorney's fees.

Count IV is an action for injunctive relief filed pursuant to §112.534, Florida Statutes (1985). (A 26).

The Fifth DCA said:

> "KELLY was employed as a Criminal Investigator for the State Attorney's office for a period of 18 1/2 years. On December 26, 1984, RAY GILL, the incoming State Attorney for the Fifth Judicial Circuit, telephoned KELLY and advised him that as of December 31, 1984, KELLY would be terminated from his position. No other notice or reasons were given to KELLY, Nor was there any pre-termination hearing. The official Notice of Termination listed KELLY as having been "laid off." (A 2).

The trial Court on 7\28\88, upon Defendant's Summary Judgment Motion to Dismiss all 4 Counts, ruled:

Count 3 : Motion Granted (Denial of due process filed under §1983);

Count I : Motion Granted (Wrongful Termination filed under - F.S. 112.531 et. seq. and F.S. §943.139(2);

Count 2 : Motion Granted (Attorney's Fees filed under - F.S.§57.105);

Count 4 : Plaintiff's Motion for Summary Judgment filed under F.S. §112.534, granted to the extent, "Defendant, RAY GILL, shall provide to Plaintiff in writing, reasons for the discharge of Plaintiff within 10 days of this Order." (A 12).

In regards to Count 3, the trial court granted the Defendant's Motion to Dismiss and held, "Defendants enjoy sovereign immunity from Plaintiff's attempt to

enforce Federal Civil Rights remedies in State Court" (emphasis added). (A 17). Also, "Plaintiff can point to no State Statute under which they now have, or could ever attain, a property interest in their jobs as State Attorney's Office Investigators." (A 17). Also, "F.S. 110.205 (2)(c) specifically excludes judicial officers and employees from the career civil service statutes," and this Court has declared Plaintiff to be a judicial employee. (A 18).

In regards to Count I, the trial court granted the Defendant's Motion To Dismiss and held, even though the Plaintiff falls under the protection of F.S. §112.531, et seq. by virtue of Florida Statutes §27.255 (1), (3); §27.251 (1); §943.10 (3), and §216.011 (jj) "it provides no remedies for damages or reinstatement as sought, but only injunctive relief to prevent Defendant

from further or continuing violations of the provision therein." (A 16)

The Plaintiff filed a timely appeal with the Fifth DCA and requested reversal of the Dismissal of Counts 1, 2 and 3, and on Cross-Appeal the Defendant claimed that the trial court erred in holding that the Plaintiff was protected by F.S. §112.531 et. seq. as claimed in Counts 1 and 3, and also erred in granting Plaintiff partial injunctive Relief under Count 4.

On 6/15/89, the Fifth DCA affirmed the trial court's granting of Summary Judgment in favor of the Defendant and reversed that portion of the Final Judgment that granted Summary Judgment in favor of the Plaintiff for injunctive relief and remanded the case to the trial court with instructions to file "an appropriate Order of Final Summary

Judgment consistent with this Opinion. Affirmed in part, reversed in part, and remanded."

With regards to Count 3, the Fifth DCA further held:

Count 3 : Affirmed and, "Kelly also has no action based on an alleged constitutional due process violation because no vested property interest arises from either contact or statute;" (A 8-9).

With regards to Count I, the Fifth DCA held:

Count 1 : Affirmed and, "while it is at least arguable that section 112.532(4) offers at least De Minimis procedural rights to a "Law Enforcement Officer", Kelly cannot claim a statutory violation because

of Section 112.531 et seq., as they relate to dismissal are not available to him." (A 7). This is because deputy sheriff's are Appointees of the Sheriff, a constitutional officer, and as such are terminable at will and not protected under F.S. §112.531 et.seq., consequently, this special status of deputy sheriff's name in §27.255 (3) makes it improper for the regular employed state attorney investigators, such as the Plaintiff, to have dismissal benefits under §112.531 et. seq. (A 8).

Plaintiff filed a timely appeal with the Supreme Court of Florida, on

November 24, 1989 the Supreme Court denied discretionary review. No Petition for Rehearing was permitted. (A 20).

## ARGUMENT

I. WHETHER OR NOT THE STATE COURT OF APPEALS ERRED AS A MATTER OF FEDERAL LAW IN HOLDING THAT THE PLAINTIFF COULD NOT LITIGATE HIS CLAIM UNDER THE FEDERAL CIVIL RIGHTS ACT OF 1871, 42 U.S.C. SECTION 1983, IN STATE COURT BECAUSE THE STATE HAS SOVEREIGN IMMUNITY FROM PLAINTIFF'S ATTEMPT TO ENFORCE FEDERAL CIVIL RIGHTS REMEDIES IN STATE COURT?

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IV. WHETHER OR NOT THE STATE COURT OF APPEALS ERRED AS A MATTER OF FEDERAL LAW IN HOLDING THAT THE PLAINTIFF WAS NOT ENTITLED TO REASONABLE ATTORNEY FEES AND

DAMAGES INCURRED AS A RESULT OF HIS WRONGFUL TERMINATION AND DENIAL OF DUE PROCESS RIGHTS UNDER FEDERAL AND STATE LAW?

On Appeal, the Fifth DCA, in regards to Count 3 for denial of due process filed under §1983, affirmed the trial courts Summary Judgment Dismissal and ruling that "Defendants enjoy sovereign immunity from Plaintiff's attempt to enforce federal civil rights remedies in State Court," (emphasis added) and added, "Kelly also had no action based on an alleged constitution due process violation because no vested property interest arises from either contract or statute." (A 8-9)

1. The appeal's court decision is contrary to well-established federal law and the decision of another state court of last resort. Pursuant to the supremacy clause, "Laws of the United States" are the "Supreme Law of the Land"

and " the judges of every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." (U.S. Constitution, Article VI, Section 2). Section 1983 is a law of the United States. "State Courts possess concurrent jurisdiction with federal courts over federal civil rights litigation under 42 USCS §1983." Felder v. Casey, U.S. , 101 L Ed2d 123 (1988), (at page 127). In Felder, this Honorable Court held:

> Moreover, as we noted in Patsy, Congress enacted §1983 in response to the deprivations of civil rights in the Southern State and the inability or unwillingness of authorities in those States to protect those rights or punish wrongdoers. Patsy, supra, at 503-505, 73 L

Ed 2d 172, 102 S Ct 2557; see also Wilson v. Garcia, 471 US, at 276-277, 279, 85 L Ed 2d 254, 105 S Ct 1938. Although it is true that the principal remedy Congress chose to provide injured persons was immediate access to federal courts, Patsy, supra, at 503-504, 73 L Ed 2d 172, 102 S Ct 2557, it did not leave the protection of such rights exclusively in the hand of the federal judiciary and instead conferred concurrent jurisdiction on state courts as well. 457 US, at 506-507, 73 L Ed 2d 172, 102 S Ct 2557 Id at 143.

In Martinez v. California, 444 U.S. 277 (1980), a state official, pursuant to a California statutes, claimed the defense of immunity under §1983, in a

state court, and this court said:

> "It is clear that the California immunity statute does not control this claim (under Section 1983) even though the federal cause of action is being asserted in the state court." IbId. 284.

This Court further explained in a footnote:

> "Conduct by persons action under color of state law which is wrongful under 42 USC s. 1983 or s. 1985(3) [42 USCS s. 1983 or s. 1985 (3)], cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the

proper construction may be enforced. See McLaughlin v. Iilendis, 398 287, 290 (7th Cir 1968). The immunity claim raises a question of federal law. Hampton v. Chicago, 484. F2d 602, 607 (CA7 1973), cert denied, 415 US 917, 39 L Ed 2d 471, 94 S Ct 1413, 94 S Ct 1414." IBID. (emphasis added).

In Felder v. Casey, Supra at P 141-142, This Court said:

"States, however, may no more condition the federal right to recover [under Section 1983] for violations of civil rights than bar that right altogether, particularly where those conditions grew out of a waiver of immunity which, however necessary to the assertion of state-created rights against local governments, is entirely irrelevant

insofar as the assertion of the federal right is concerned, see Martinez, 444 U.S. at 284 62 L Ed 2d 481, 100 S Ct 553." (emphasis added).

These two cases Martinez and Felder, clearly show that pursuant to federal law, the liability of the state subdivisions and their employees to actions brought under §1983 in state courts is "essentially" a question of "Pre-Emption," Felder Supra at 138. Under the Supremacy clause Pre-Emption operates as a matter of federal law. Felder, IBID. Martizez and Felder make it clear, that whether a state seeks to make a new immunity for particular officials or seeks to condition a waiver of immunity based on conditions not contained in §1983, that in either case federal law is supreme.

In Will v. Michigan Department of State Police, et al, 491 US , 105 L Ed 45, 109 S CT. (198(), This court said:

> A state that waives its sovereign immunity can be held liable for "deprivations of civil liberties" in an action brought under section 1983. IBID at 55.

The state of Florida has waived sovereign immunity under Florida Statutes §768.28 (1984) in tort actions, and under §112.5432 (3) (1984) for civil rights actions, In Mesa v. Rodriguez, Fla., 357 So. 2d 711 (Supreme Court of Florida 1978), a police officer sued a private citizen, who complained of mistreatment by the officer, for violation of the officers civil rights during performance of his official duties. The trial court entered Summary Final Judgment for the citizen and found F.S. §112.532 (3), the

cause of action statute for the suit, to be unconstitutional, and the officer appealed. The Supreme Court of Florida reversed the trial court's order, declared the questioned statute constitutional and remanded the cause for proceedings consistent with this opinion. In reaching this opinion the court, in part, said:

> "Section 112.532 (3), Florida Statues, the section of the statutes under which Mesa brought suit, is contained in Part VI of Chapter 112, Florida Statues, the chapter of general provisions governing public officers and employees. Part VI is entitled "Law Enforcement Officers," and is commonly known as the "The Policeman's Bill of Rights. The section declares that every law enforcement officer has the right

to bring a civil suit for damages suffered during the performance of his official duties or for abridgment of his civil rights arising out of the performance official duties." "The challenged statutory section simply declares that law enforcement officer have a right to recover damages suffered during performance of their official duties. And, while the part of the statues in which the challenged section is laid provides protection for the due process rights of police officers under investigation, it also provides for the airing of grievances. (at P 712-713)

§112.532 (3) also defines who civil suits can be brought against, "any person, group of persons, or organization or corporation, or the head of such

organization or corporation..." By definition an organization is a "government or governmental subdivision or agency." Black's Law Dictionary, Fifth Edition, 1979. (West Publishing Company., St. Paul Minn.) at page 991.

In regards to F.S..§110.205(2) (c) which the trial court said excludes judicial employee from the career civil service status and that the Plaintiff was a judicial employee, this section of law deals only with claims of rights for certain specified employees as outlined and contained in the various sections of chapter 110. Consequently, this statement made by the trial court is immaterial and irrelevant to the case at bar, and the trial court recognized this because regardless of the statement, the court ruled that the Plaintiff falls under the protection of F.S. §112.531 et seq. (A 14).

Nominal damages are allowed in violations of constitutional rights. Bell v Gale, 384 F. Supp. 1022 (D.C., Tex. 1974); Batista v. Weir, 340 F. 2d 74 (3d Cir, 1965).

Punitive damages are allowed in §1983 suits. Baltezore v. Concordic Parish Sheriff's Department, 767 F. 2d 702 (5th Cir, 1985).

On November 13, 1989, the Honorable U.S. Supreme Court in a §1983 case that is right on point with the claim in this count at bar, allowed a writ of Certiorari in a Florida case, Mark Howlett, et al v. Scott Rose, Supreme Court Case No. 89-5383.

In regards to count I for wrongful termination filed under Florida Statues §112.531 et seq. and §943.139, the Fifth DCA on appeal, affirmed the trial court's Summary Judgment Dismissal of the count and held that:

"While it is at least arguable that section 112.532(4) offers at least De Minimis procedural rights to a "Law Enforcement Officer," Kelly cannot claim a statutory violation because of §112.531 et seq., as they relate to dismissal are not available to him." (A 7). And this is because deputy sheriff's are appointees of the sheriff, a constitutional officer, and as such are terminable at will and not protected under F.S. §112.531 et. seq. Consequently, this special status of deputy sheriff's named in §27.255 (3) makes is improper for the regular employed State Attorney Investigators, such as the Plaintiff, to have dismissal benefits under §112.531 et. seq. (A 8).

1. The appeal's court decision is contrary to well-established federal law and the decision of another state court of last resort. The Fifth DCA's decision which limits the Plaintiff's due process rights by holding Plaintiff, although he had at least "de minimis" procedural rights pursuant to §112.532(4), Florida Statues, was not entitled to the dismissal benefits provided in said statues, is contrary to well established federal law. Pursuant to the supremacy clause, "laws of the United States" are the "supreme law of the land: and "the judges of every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding" (U.S. Const. Art. VI Section 2). Section 1983 is a federal law. In Martinez, supra at P. 284, this Court stated:

"Conduct by persons action under color of state law which is wrongful under 42 USC s. 1983 or s. 1985(3) [42 USCS s. 1983 or s. 1985 (3)], cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced. See McLaughlin v. Iilendis, 398 287, 290 (7th Cir 1968). The immunity claim raises a question of federal law. Hampton v. Chicago, 484. F2d 602, 607 (CA7 1973), cert denied, 415 US 917, 39 L Ed 2d 471, 94 S Ct 1413, 94 S Ct 1414." IBID. (emphasis added).

In Board of Regents of State Colleges v. Roth, 92 S. Ct. 2701-2705 (1972), this Court held that once a constitutional due process property right has been established, it's constitutional safeguards can not be limited. In Cleveland Board of Education v. Loudermill, 470 US 532, 84 L Ed 2d 494, 105 S ct 1487 (S Ct. 1985), this court held that constitutional due process property rights are "a matter of federal law," and could not be limited and, in part, said:

> "In Vitek v Jones, 445 US 480, 491, 63 L Ed 2d 552, 100 S Ct. 1254 (1980), we pointed out that "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that

the preconditions to adverse official action." This conclusion was reiterated in Logan v. Zimmerman Brush Co. 455 US 422, 432, 71 L Ed 2d 265, 102 S Ct 1148 (1982) (Id at P. 523).

The Supreme Court of Florida in Mesa v. Rodriguez, supra, established that F.S. §112.531 et seq. created a constitutional due process property right or law enforcement officers defined therein. The trial court ordered that the Plaintiff was protected under F.S. §112.531 et. seq. The Fifth DCA affirmed this ruling, but limited it's safeguards to the Plaintiff, namely excluded his dismissal rights.

In Biship v. Wood, 96 S. Ct. 20-74 (1976), this court held a property interest can be created by statute ordinance or contract. In Cleveland

Board of Education v. Loudermill 470 US 2, 84 L Ed 2d 494, 105 S. Ct. (1985), this Court said:

> "Property interest are not created by the constitution, "They are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law..." Board of Regents v. Roth, Supra, at 577, 33 L Ed 2d 548, 72 S Ct. 2701. See also Paul v Davis, 424 US 693, 709, 47 L Ed 2d 405, 96 S Ct 1155 (1976). The Ohio statute plainly creates such an interest...(IBID at P501) (emphasis added). Even decisions finding no constitutional violation in termination procedures have relied on the existence of some pre-termination opportunity to respond.

For example, in Arnet, six justices found constitutional minima satisfied where the employee had access to the material upon which the charge was based and could respond orally and in writing and present rebuttal affidavits...IBID at P 504. (emphasis added). An essential principal of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Handover Bank and Trust Co. 339 US 306 313 94 L Ed 865 70 S Ct 652 (1950). IBID at P 503.

Florida Statutes §112.531 et seq., and §943.139 (1) (2), clearly meet the requirements of federal law to entitle the Plaintiff to a constitutionally

protected property interest in his employment with the Defendant as ruled in City of Hallandale v. Iglima, Fla App., 346 So. 2d 84 (4th DCA 1977) and Mesa v. Rodriguez, Supra at apge 712-713. (A 21) for §112.531 et seq) (A 30 for §943.139 (1) (2)).

In Inglima, Supra, two police officers brought suit against their chief and the city, seeking reinstatment and back pay, claiming a violation of statutory procedures in regards to their dismissal. The cause of action was filed under §112.532(3). The Fla. 4th DCA said:

> ...Appelles contended that they were entitled to notice of the intended disciplinary action prior to being dismissed. Section 112.532(4) clearly mandates such notice. and appellants violated appellees rights by failing to

comply with that mandate.....

(at P 84-85)

The 4th DCA remanded the case to the trial court and stated:

> ...If the trial court upon final hearing finds the appellees were wrongfully dismissed and they they are entitled to reinstatement and payment of back wages, that relief can be fully afforded them at that time. (at P 86).

In Mesa, supra at P 712-713, the Supreme Court of Florida made reference to Inglima, supra, and said that F.S. §112.531 et seq., "The policeman Bill of Rights," provides that "Every law enforcement officer" defined therein is entitled to bringing a civil suit against the state for "damages suffered during the performance of his official duties or for abridgement of his civil rights

arising out of the performance of official duties," and this section of law "provides protection for the due process rights of police officers under investigation, it also provides for the airing of grievances."(At PP 712-713).

In regards to the 5th DCA's ruling and holding concerning §27.255(3) reference the inclusion of deputy sheriff's being approved for employment by state attorneys as "Special Organized Crime Investigators" under §27.251 (A 28 for §27.255(3)) and (A 27 for §27.251(1)) and having the same rights, protections, and immunities afforded other peace or Law Enforcement Officers invalidating the Plaintiff from having dismissal rights under §112.531 et seq., this ruling and limiting of the Plaintiffs rights under F.S. §112.531 et seq., should fail because the Plaintiff does not need

§27.255(3) in any manner whatsoever to comply with the definition of law enforcement officer as prescribed in §112.531 et seq., for entitlement to all rights contained therein. However, even if the Plaintiff needed the help of §27.255(3), it would be constitutional because under Article VIII, Section 1(g) and 6(d) of the Florida Constitution of 1968, it allows deputy sheriff's to have employment protection pursuant to a Florida Statute or County Ordinance.

In Evans v Hardcastle, Fla App 339 So2d 1150 (2nd DCA 1976), the Florida 2nd DCA held that deputy sheriff's have a right to constitutionally protected employment under state statute or county ordinance pursuant to "Article 8 Sect. 1(g) and 6(d) of the Florida Constitution of 1968." (Id at Page 1151)

In Murphy v Mack, Fla., 358 So2d 822, (S. CT. 1978), The Supreme Court of Florida held that a deputy sheriff is entitled to any and all rights granted to him "by the constitution or statute law of the state," and in further explanation said:

> "The office of deputy is described in 70 Am.Jur.2d Sheriffs, Police and Constables § 2, and we quote with approval the following except therefrom: "The office of under or deputy sheriff is a common-law office; and this is the rule unless a change is effected by the constitution or statute law of the state. He holds an appointment,as distinguished from an employment. Where so clothed with power, a deputy sheriff is a public officer, although he may not be a state or

municipal officer within the meaning of constitutional provisions. A deputy sheriff is a public officer under laws which require his appointment by the sheriff to be approved by a judge, and which provide that he must take an oath of office, and confer on him powers and duties equal to those of the sheriff himself. As such, he has been held not subject to civil service regulations. And in the absence of specific language including deputy sheriffs, a deputy Sheriff has been held to be an official, and not an employee, of a county, within the meaning of a workmen's compensation act. A deputy sheriff has been held to be embraced within the words "or other county officer" contained in a statute

relating to jury service, and, a special deputy, or one employed in particular cases has been held to be an officer of the state under a statutory provision relating thereto." (Emphasis added) (Id at P825).

One section of law within F.S. 112.531 et. seq. specifically names "deputy sheriff's namely section 112. 533(1) and 112. 533 (2) (a), to wit:

"every agency employing law enforcement officers or correctional officers shall establish and put into operation a system for the receipt investigation and determination of complaints received by such employing agency from any person. (emphasis added). 112.533 (2) (a). A complaint filed against a law enforcement agency or correctional

agency and all information obtained pursuant to the investigation by the agency of such complaint shall be confidential until the conclusion of the internal investigation or at such time that the investigation ceases to be active without a finding relating to probable cause....(emphasis added).

By adding "including a deputy sheriff," when identifying "law enforcement officer," in sub-section (2) (a), clearly shows that the Florida Legislature did not intend for deputy sheriffs employed by the sheriff to be included as law enforcement officers "employed full-time by" an "employing agency" that they define in F.S. 112.531 entitled to constitutional due process rights under F.S.112.531

et seq. when they enacted it is 1974.

However, the simultaneous modification of F.S. 27.255 (3) (A 29), with the 1978 enactment of F.S. 27.251 (A 27), a statute creating special organized crime investigators to be employed on a "full-time basis" by state attorneys for "a special task force to investigate matters involving organized crime," clearly shows that with the creation of this special category of state attorney investigators the legislature expressly intended for deputy sheriff's defined within this newly created category of state attorney investigators to have "the same rights, protections and immunities afforded other peace or law enforcement officers" as defined in §112.531 et seq. This is permissable under the Florida constitution as well as under federal law as explained in Cleveland Board of

Education v. Lauderhill, supra, when this court said "property interests are not created by the constitution they are created and their dimensions are defined by the existing rules or understandings that stem from an independent source such as state law..." Board of Regents v Roth, supra at 577, 33 L Ed 2d 548, 92 S ct 2701. See also Paul v. Davis, 424 U.S. 693, 709, 47 L Ed 2d 405, 96 S Ct 1155 (1976). (emphasis added) (Id at P 501).

Supreme Court, U.S.
FILED
JAN 22 1990
JOSEPH F. SPANIOL, JR.
CLERK

89-1188

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, 1989 TERM

JAMES C. KELLY,

Petitioner,

versus

S. RAY GILL, ETC., ET AL,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH DISTRICT COURT OF APPEAL FOR THE STATE OF FLORIDA

APPENDIX

JAMES C. KELLY, Pro Se
10135 W. Sunrise Blvd.
Apartment 101
Plantation, Florida 33322
(305) 467-4403

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1989

JAMES C. KELLY,

APPELLANT,

V. CASE NO. 88-1739

S. RAY GILL, etc., et al.,

APPELLEE.

Opinion filed June 15, 1989

Appeal from the Circuit Court for Marion County, Wallace E. Sturgis, Jr., Judge.

Mark D. Shelnutt of Mark D. Shelnutt, P.A., Ocala, for Appellant.

Robert A. Butterworth, Attorney General and Deborah J. Stephens, Assistant Attorney General, Tallahassee, for Appellees.

COBB,J.

The main issue on this appeal is whether the appellant (James Kelly), a former investigator for the state attorney's office was wrongfully discharged as a result of being denied the benefits of the law enforcement officers bill of rights pursuant to

section 112.531, et seq., Florida Statutes (1985).1

Kelly was employed as a criminal investigator for the state attorney's office for a period of 18 1/2 years. On December 26, 1984, Ray Gill, the incoming state attorney for the Fifth Judicial Circuit, telephoned Kelly and advised him that as of December 31, 1984, Kelly would be terminated from his position. No other notice or reasons were given to Kelly, nor was there any pre-termination hearing. The official notice of termination listed Kelly as having been "laid off." Approximately two years later, Kelly filed a Complaint against Gill in his official capacity as state attorney. Kelly alleged that the office of the state attorney was an "employing agency" and that Kelly was a "law enforcement officer," so that a

property right was created under the law enforcement officers bill of rights.

That trial court granted Gill's motion for summary judgment in regard to Kelly's claim for wrongful termination finding that no action could be maintained under a contract or tort theory. Kelly's motion for summary judgment was granted to the extent that the trial court found that section 27.255(1), (3), Florida Statutes (1985) 2 applied fully to investigators employed by the State Attorney and thus, section 112, 531, et seq. was applicable to Kelly also. The trial court added that even though Kelly fell within the purview of the law enforcement officers bill of rights, the particular sections provided no remedies for damages or reinstatement, but only injunctive relief which would require Gill to provide Kelly with

written reasons for the latter's discharge.

Kelly filed a timely notice of appeal and contends that the trial court erred in granting Gill's motion for summary judgment as to Kelly's claim for wrongful termination regarding due process violations. On cross-appeal, Gill urges that the trial court erred in holding that Kelly was covered by the law enforcement officers bill of rights and in granting injunctive relief. In the absence of a specific statutes granting a property interest, a contract of employment (implied or express) which is indefinite as to term of employment is terminable at the will of either party without cause and an action for wrongful discharge will not lie. Smith v. Piezo Technology and Professional Administrators, 427 So2d 182 (Fla. 1983);

Gibbs v. H.J. Heinz Company,536 So.2d 370 (Fla. 5th DCA 1988); Grappoine v. City of Miami Beach, 495 So.2d 838 (Fla. 3d DCA 1986); McConnell v Eastern Airlines, Inc., 499 So.2d 68 (Fla. 3d DCA 1986); Muller v. Streomberg, Calson Corporation, 427 So.2d 266 (Fla. 2d DCA 1983); Roy Jorgesen Associates, Inc. v. Deschenes, 409 So.2d 1188 (Fla. 4th DCA 1982). There is no cause of action based in common law tort for wrongful dismissal such as negligence, malice, or retaliation. 3 It is also clear that breach of an obligation of good faith and fair dealing has not been recognized in Florida as a viable cause of action, at least where a wrongful dismissal is claimed. Mueller at 269.

In the instant case, Kelly has shown no express or implied contract which would remove this factual situation from

the "at will" doctrine and contrary to what is alleged on appeal, an individual cannot be wrongfully discharged under an at will doctrine solely because that individual was denied some limited statutory procedural right (i.e.,§112.532(4), Fla. Stat. (1985)). A statute cannot create a property interest unless it lists the specific grounds for discharge or states that an employee can only dismissed for just cause. Ragucci v. City of Plantation, 407 So.2d 932 (Fla. 4th DCA 1981). A statutory provision that requires minimal procedural steps prior to termination will not in and of itself create a property interest in continued employment. Zeigler v. Jackson, 716 F2d 847 (11th Cir. 1983). Even assuming that section 112.532 (4) affords a law enforcement officer procedural rights, theses

"reasons" do not invoke the requirements of "just cause" or the requirement of specific grounds for termination.

While it is at least arguable that section 112.532(4) offers at least de iminimis procedural rights to a "law enforcement officer, "Kelly cannot claim a statutory violation because the benefits of section 112.531, et seq., as they relate to dismissal are not available to him. Section 27.255(3), Florida Statutes (1985) states that an investigator "appointed" pursuant to the provisions of section 27.251 (i.e., sheriff's deputy on full-time basis as an investigator), has the same rights afforded other law enforcement officers when in the performance of any of the powers, duties, or functions authorized by law. Both parties acknowledge, as does the trial court, that deputy sheriffs are appointees of a

constitutional office and as such, are terminable at will and not entitled to the protections of section 112.531, et seq., Florida Statutes. Under the reasoning of the trial court, to allow investigators the benefits of sections 112.532 and 112.534, pursuant to section 27.255(3), would also allow appointed deputy sheriffs, as investigators, those same rights. This would clearly be inconsistent; by becoming an appointee of the state attorney's office, a deputy sheriff would have greater rights than if he had remained solely with his primary employer. 4 Evans v. Hardcastle, 339.So.2d 1150 (Fla. 2nd DCA 1976). As a result, even though under section 27.255(1), an investigator is called a "law enforcement officer," this does not mean that a state attorney's investigator has the benefits of section 112.531, et seq.

In light of the above discussion, Kelly also has no action based on an

alleged constitutional due process violation because no vested property interest arises from either contact or statutes. 5 Accordingly, the final judgment of the trial court granting summary judgment in favor of Gill is affirmed. That portion of the final judgment which grants summary judgment in favor of Kelly regarding injunctive relief is reversed. 6 Upon remand the trial court will file an appropriate order of final summary Judgment consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

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1 Part VI, section 112.531(1), (3) defines "Law enforcement officer" and "employment agency." Section 112.532(1) deals with rights of officers which under investigation as the result of an outside complainant. Section 112.532(2) establishes a review board to consider these outside complaints. Section 112.532(3) gives an officer the right to

bring a civil suit against another. Section 112.532(4), (5) requires notice of disciplinary action as well as a prohibition against disciplinary action as a result of an officer exercising his rights under Part VI.

Section 112.533 establishes a system for the receipt and processing of outside complaints made against an officer. Section 112.534 specifies that if an agency fails to comply with Part VI, an injured officer may apply to the circuit court for an injunction to compel performance.

2
Section 27.255(1) states in part:

> Each investigator employed on a full-time basis by a state attorney and such special investigator appointed by the state attorney pursuant to the provision of section 27.2451 is hereby declared to be a law enforcement officer of the state...

Section 27.;255(3) states:

> In the performance for any of the powers, duties, and functions authorized by law or this section, investigators employed by a state attorney or appointed pursuant to the provisions of section 27.251 shall have the same rights, protections, and immunities afforded other peach or law enforcement officers.

Section 25.251 merely authorized the state attorney of each judicial circuit to employ any municipal or county police officer or sheriffs deputy on a full-time basis as an investigator for the state attorney's office.

3
See Smith at 184; Hartley v. Ocean Reef Club, Inc., 476 So.2d 1327, 1330 (Fla. 2d DCA 1985) (the legislature has not created a statutory action for wrongful discharge in general and no common law cause of action for retaliatory or wrongful discharge exists in Florida).

4
Also note that under section 111.065, Florida Statutes (1985), a deputy sheriff is defined as a "law enforcement officer" even though section 112.531, et seq. is not available to the deputy sheriff. Compare the definitions of "law enforcement officer" in sections 112.19 and 112.1904.

5
In Migliore v. City of Lauderhill, 431 So.2d 986 (Fla. 1983), the Florida Supreme Court held that complaint review board, a authorized by section 112.532(2), were not created to review disciplinary actions against police officers which arose from an internal source. While not necessary to decide this appeal, it would appear that all of part VI, section 112.531, et seq., deals specifically with investigations, complaints, and disciplinary action as a result of claims made against an officer by persons outside the agency which employs him.

6
In addition to the reasons given herein, see Migliore v. City of Lauderhill, 415 So.2d 62, 64, (Fla. 4th DCA 1982) (neither mandamus nor injunctive relief is available to require the performance of a futile act.)

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR MARION COUNTY.

JAMES C. KELLY,

Plaintiff,

V.

Case No. 86-44441-CA-A

S. RAY GILL, etc., et al.,

Defendant.
_____/

O R D E R

This cause, having come before the Court on the Motions for Summary Judgment filed by both parties, and the Court having reviewed the memoranda of law submitted and having heard argument of counsel, does hereby make the following findings of fact and conclusions of law:

FACTS

The undisputed facts of this case. are that:

1. Plaintiff was at all times material, a criminal investigator for the Defendant, State Attorney's Office.

2. Plaintiff was discharged from that position effective December 31, 1984, by letter from Defendant Gill dated December 26, 1984.

3. Aside from the above-referenced termination letter, Plaintiff received no notice; was given no reason; and was not afforded any hearing, pursuant to said dismissal.

ANALYSIS

Plaintiff contends he was a "law enforcement officer" as that term is defined under Florida Statutes; is entitled to certain procedural due process rights prior to termination; was not afforded those rights prior to termination; and seeks injunctive relief and damages.

Defendants contend that a State Attorney investigator is analogous to a deputy Sheriff; is a political appointee

employed at will; and can be discharged at any time without any procedural due process rights. Additionally, Defendants contend that they are sovereignly immune from suit on the grounds that they are not "employers" of "law enforcement officers"; no tort has been committed under F.S. §768.28 and Federal civil rights legislation cannot be enforced against state officials in state court.

Under Florida Statutes §27.255 (1), (3), investigators employed by the State Attorney's office are law enforcement officers of the State and "shall have the same rights, protections and immunities afforded other law enforcement officers." Plaintiff argues that those privileges extend to the protection of F.S. §112.531 et. seq., commonly known as the Law Enforcement Officers Bill of Rights. This Court agrees.

Defendants correctly point out that deputy Sheriffs have been held by numerous courts to be "appointees" of a constitutional officer (the Sheriff); terminable at will and not entitled to the protection of F.S. §112.531. They argue, by analogy, that State Attorney investigators are "appointees"; terminable at will and entitled to no benefits. The Court does not agree. Plaintiff is defined as an employee by F.S. §27.255. Although the Court sees an analogy between assistant State Attorneys and deputy Sheriffs (both being an appointed extension of the constitutional officer), we cannot see how staff employees, hired to facilitate the exercise of the duties can be labeled "appointees".

Defendants next argue that the State attorney's Office in not an "employer".

The language of F.S. §27.25(1), and §943.10 (4), 216.011 (jj) are to the contrary.

The Florida courts have dealt with the remedies that are available under §112.534 and have concluded that it "...is no more than a vehicle for enforcing the procedures established in the proceeding section of this part of the statute; it is not a vehicle for the restoration of substitutive rights...". Migliore v. Lauderhill, 415.So.2d 62 (4th DCA 1982). The courts have also held that under §112.534 there is no subject matter jurisdiction to entertain an action for damages. Miami v. Cosgrove, 516 So.2d 1125 (3rd DCA 1987). Thus even thought the Plaintiff herein falls under the purview of F.S.§112.531, et seq., it provides no remedies for damages or reinstatement as sought, but only

injunctive relief to prevent Defendant from further or continuing violations of the provisions therein.

Plaintiff nest argues that they are entitled to certain due process rights under 42 U.S.C.§1983 or the Florida Constitution by virtue of having a "property right" in their employment. Firstly, Defendants enjoy sovereign immunity from Plaintiff's attempt to enforce federal civil rights remedies in state court. Hill v. Department of Corrections, 513 So.2d 129 (Fla 1987). Plaintiff relies on Board of Regents v Roth, 408 U.S. 564; 92 S.CT. 2701 (1972), for the creation of a property right. However, unlike Roth, Plaintiff can point to no state statutes under which they now have, or could ever attain, a property interest in their jobs as State Attorney's Office investigators.

Moreover, F.S.§110.205(2)(c) specifically excludes judicial officers and employees form the career civil service status. This Court has already found Plaintiff to be a judicial employee.

Lastly, Plaintiff argues that Defendant, by violating the notice provision of F.S. §112.534 and §943,39, have committed a compensible tort for which Defendant have waived immunity under F.S.§768.28. Since the law as it stands in Florida does not give Plaintiff either a property right or a procedural due process by statute, then no duty exists from which a breach could occur.

For the foregoing reasons it is, hereby

ORDERED AND ADJUDGED:

1. Defendants' Motion for Summary Judgment as to Plaintiff's claim under 42.U.S.C. §1983 is GRANTED.

2. Defendants' Motion for Summary Judgment as to Plaintiff's claim for Wrongfull termination is GRANTED.

3. Defendants' Motion for Summary Judgment as to Plaintiff's claim for attorney's fees is GRANTED.

4. Plaintiff's Motion for Summary Judgment as to Plaintiff's claim for Injunctive Relief is GRANTED; Defendant, Ray Gill, shall provide to Plaintiff in writing, reasons for the discharge of Plaintiff within 10 days of this order.

DONE AND ORDERED in Chambers at Ocala, Marion County, Florida, this 28th day of July, 1988.

WALLACE E. STURGIS, JR.

SUPREME COURT OF FLORIDA
Tuesday, October 24, 1989

JAMES C. KELLY,

Petitioner, Case No. 74,400
.. District Court of Appeal
v. Fifth District
No. 88-1739
S. RAY GILL, ETC., ET AL.,

Respondents.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under article V, Section 3 (b), Florida Constitution (1980-), and the Court having determined that is should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P.1 9.330(d).

OVERTON, acting C.J, SHAW, BARKETT and dissents

POLICEMAN'S BILL OF RIGHTS
FLORIDA STATUTES §112.531 et seq (1985)

PART VI
112.531 Definitions- As used in this act:

(1) "Law enforcement officer" means any person other than a chief of police, who is employed full time by any municipality or the state or any political subdivision thereof and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws for this state.

(2) "Correctional officer" means any person, other than a superintendent, who is appointed or employed full time by the state or any political subdivision thereof whose primary responsibility is the supervision, protection, care, custody, or control of inmates within a correctional institution; however, the term "correctional officer" does not include an secretarial, clerical, or professionally trained personnel.

(3) "Employing agency" means any municipality or the state or any political subdivision thereof which employs law enforcement officers or correctional officers as defined in this section.

112.532 Law enforcement officer's and correctional officers' rights- All law enforcement officers and correctional officers employed by any employing agency shall have the following rights and privileges:

(1) RIGHTS OF LAW ENFORCEMENT OFFICER AN CORRECTIONAL OFFICERS WHILE UNDER INVESTIGATION- Whenever a law

enforcement officer or correctional officer is under investigation and subject to interrogation by members of his agency for any reason which could lead to disciplinary action,m demotion, or dismissal, such interrogation shall be conducted under the following conditions:

(a) The interrogation shall be conducted at a reasonable hour, prrferably at a time when the law enforcement officer or correctional officer is on duty, unless the seriousness of the investigation is of such a degree that immediate action is required.

(b) The interrogation shall take place either at the office of the command of the investigating officer or at the office of the local precinct, police unit,l or correctional unit in which the incident allegedly occurred, as designated by the investigation officer or agency.

(c) The law enforcement officer or correctional officer under investigation shall be informed or the rank, name, and command of the officer in charge of the investigation , the interrogating officer, and all persons present during the interrogation. All questions directed to the officer under interrogation shall be asked by and through one interrogator at any one time.

(d) The law enforcement officer or correctional officer under investigation shall be informed of the nature of the investigation prior to any interrogation, and he shall be informed of the name of all complainants.

(e) Interrogating sessions shall be for reasonable periods and shall be timed to allow for such personal necessities

and rest periods as are reasonable necessary.

(f) The law enforcement officer or correction office under interrogation shall not be subjected to offensive language or be threatened with transfer, dismissal, or disciplinary action. No promise or reward shall be made as an inducement to answer any questions.

(g) The formal interrogation of a law enforcement officer or correctional office, including all recess periods, shall be recorded, and there shall be unrecorded questions or statements.

(h) If the law enforcement officer or correctional officer under interrogation is under arrest, or is likely to be placed under arrest as a result of the interrogation, he shall be completely informed of all his rights prior to the commencement of the interrogation.

(i) at the request of any law enforcement officer or correctional officer under investigation, he shall have the right to be represented by counsel or any other representative of his choice, who shall be present at all times during such interrogation whenever the interrogation relates to the officer's continued fitness for law enforcement service.

(2) COMPLAINT REVIEW BOARDS- A complaint review board shall be composed of three members: One member selected by the chief administrator of the agency or unit; one member selected by the aggrieved officer; and a third member to be selected by the other two members. Agencies or units having more than 100 law enforcement officers or correctional officers shall utilize a five-member board, with two members being selected by

the administrator, two members being selected by the aggrieved officer, and the fifth member being selected by the other four members, The board members shall be law enforcement officers or correctional officer selected from any state, county, or municipal agency within the county. There shall be a board for law enforcement officers and a board for correctional officer whose members shall be from the same discipline as the aggrieved officer.

(3) CIVIL SUITS BROUGHT BY LAW ENFORCEMENT OFFICERS OR CORRECTIONAL OFFICERS- Every law enforcement officer or correctional officer shall have the right to bring civil suit against any person, group of persons, or organization or corporation, or the head of such organization or corporation, for damages, either pecuniary or otherwise, suffered during the performance of the officer's official duties or for abridgment of the officer's civil rights arising out of the officer's performance of official duties.

(4) NOTICE OF DISCIPLINARY ACTION- No dismissal, demotion, transfer, reassignment, or other personnel action which might result in loss of pay or benefits or which might otherwise be considered a punitive measure shall be taken against any law enforcement officer or correctional officer unless such law enforcement officer or correctional officer is notified of the action and the reason or reasons therefor prior to the effective date of such action.

(5) RETALIATION FOR EXERCISING RIGHTS- No law enforcement officer or correctional officer shall be discharged;

disciplined, demoted; denied promotion, transfer, or reassignment; or otherwise discriminated against in regard to him employment or be threatened with any such treatment by reason of his exercise of the rights granted by this part.

112.533 Receipt and processing of complaints-

(1) Every agency employing law enforcement officers or correctional officer shall establish and put into operation a system for the receipt, investigation, and determination of complaints received by such employing agency from any person.

(2) (a) A complaint filed against a law enforcement officer, including a deputy sheriff, or correctional office with a law enforcement agency or correctional agency and all information obtained pursuant to the investigation by the agency of such complaint shall be confidential until the conclusion of the internal investigation or at such time that the investigation ceases to be active without a find relating to probable cause to proceed with disciplinary action or file charges against the officer, a statement to that effect signed by the agency heard or his designee and the responsible investigating official shall be attached to the complaint; and the complaint and all such information shall be open thereafter to inspection pursuant to chapter 119. If the internal investigation is concluded with the finding that there is probable cause to proceed with disciplinary action or file charges, the complaint and all such

information shall be open thereafter to inspection pursuant to chapter 119. If the investigation ceases to be active without a finding relating to probable cause, the complaint and all such information shall be open thereafter to inspection pursuant to chapter 119.

(b) This subsection does not apply to any public record which is exempt from public record which is exempt from public disclosure pursuant to §119.07(3). For the purposes of this subsection, an investigation shall be considered active as long as it is continuing with a reasonable, good faith anticipation that an administrative finding will be mad e in the foreseeable future. An investigation shall be presumed to be inactive if no finding is made within 60 days after the complaint is filed.

(c) Nothwithstanding other provision of this section, the complaint and information shall be available to law enforcement agencies and state attorneys in the conduct of a lawful criminal investigation.

(3) Any persons who willfully discloses, or permits to be disclosed, his intention to file a complaint; the existence or contents of a complaint which has been filed with an agency; or any document, action, or proceeding in connection with a confidential internal investigation of an agency, before such complaint, document, action, or proceeding becomes a public record as provided herein is guilty of a misdemeanor of the first degree, punishable as provided in §775.082 OR §775.083.

112.534 Failure to comply- If any agency employing law enforcement officers or

correctional officers fails to comply with the requirements of this part, a law enforcement officer or correctional officer employed by such agency who is personally injured by such failure to comply may apply directly to the circuit court of the county wherein such employing agency is headquartered and permanently resides for an injunction to restrain and enjoin such violation of the provision of this party and to compel the performance of the duties imposed by this part.

27.251 Special organized crime investigators -

(1) The state attorney of each judicial circuit is authorized to employ any municipal or county police officer or sheriff's deputy on a full-time basis as an investigator for the state attorney's office with full powers of arrest throughout his judicial circuit provided such investigator serves on a special task force to investigate matters involving orgainized crime, and, provided further, that the salary of such municipal or county police officer or sheriff by which the investigator is principally employed, and with consent of the county, sheriff, or municipality. The arrest powers granted herein shall be exercised only in furtherance of the conduct of the business of the special task force to which such municipal or county police officer or sheriff's deputy as assigned by the said state attorney.
(2) Each state attorney shall, on or before January 1 of each year, submit a report to the President of the senate and Speaker of the House, which report shall specify the number of municipal police

officers and sheriff's deputies which have been employed by him during the preceding fiscal year pursuant to this section and an estimate of the number of such officers and deputies which will be employed by him during the current fiscal year.

27.255 Investigators; authority to arrest, qualifications, rights, immunities, bond, and oath-

(1) Each investigator employed on a full-time basis by a state attorney and each special investigator appointed by the state attorney pursuant to the provision pointed by the state attorney pursuant to the provisions of §27.251 is hereby declared to be a law enforcement officer of the state and conservator of the peach, under the direction and control of the state attorney who employs him, with full powers of arrest, in accordance with the laws of this state. Such investigator may arrest any person for violation of state law or applicable county or city ordinances when such violation occurs within the boundaries of the judicial circuit served by the state attorney employing the investigator, except that arrests may be made out of said judicial circuit when hot pursuit originates within said judicial circuit. Such investigator shall, within the boundaries of the judicial circuit served by such state attorney, have full authority to serve any arrest warrant, search warranty, witness subpoena, capias, or court order issued by any court or judge within such judicial circuit in a criminal case, or in connection with a criminal investigation, when the same is directed

to him. He may carry weapons on or about his person in the same manner as other law enforcement officers.

(2) All investigators employed by a state attorney or appointed pursuant to the provision of §27.251 shall meet the minimum standards established by the Criminal Justice Standards and Training Commission of the Department of Law Enforcement for the employment and training of law enforcement officers under chapter 943, except that investigators employed by a state attorney on July 1, 1974, shall not be required to meet such standards.

(3) In the performance of any of the powers, duties and functions authorized by law or this section, investigators employed by a state attorney appointed pursuant to the provision of §27.251 shall have the same rights, protections, and immunities afforded other peace or law enforcement officers.

(4) Any full-time investigator employed by the state attorney and any special investigator appointed by the state attorney pursuant to the provision of §27.251 shall, before entering into the performance of his duties, take and file the oath as prescribed in §5, Art. II of the State constitution and enter in to a good and sufficient bond with a surety company authorized to do business in this state as surety thereon, conditioned on the faithful performance of his duties and payable to the Governor and his successors in the penal sum of $5,000 00.

FLORIDA STATUTES §57.105 (1985)

57.105 Attorney's fees - The court shall award a reasonable attorney's fee to the prevailing party in any civil action in which the Court finds that there was a complete absence of justiciable issue of either law or fact raised by the losing party.

FLORIDA STATUTES § 943.139 (1985)

943.139 Notice of employment, appointment or termination; response by the officer; duty of commission-

(1) An employing agency shall immediately notify the commission in writing, on a form adopted by the commission, of the employment , appointment, or termination of employment or appointment of any officer.

(2) In a case of termination, the employing agency shall notify the commission and the officer, in writing, of the termination, setting forth in detail in the facts and reasons for such termination. If the officer is terminated for his failure to comply with the provision of §943.13, the notice shall so specify. Any officer who has been terminated shall be permitted to respond to the termination, in writing, to the commission, setting forth the facts and reasons for the termination as he understands them.

FLORIDA STATUTES §110.205

110.205 Career service; exemptions-

(1) CAREER POSITIONS- The career service to which this party applies includes all positions not specifically exempted by this part, any other

provision of the Florida Statutes to the contrary nothwithstanding.

(2) EXEMPT POSITIONS- The exempt positions which are not covered by this party include the following, provided no position, except for positions established for a limited period of time pursuant to paragraph (i), shall be exempted if the position reports to a position in the career service.
(c) Members of boards and commissions, however selected. the department shall set the salary of these positions unless otherwise fixed by law.
(k) All officers and employees of the judicial branch. The department shall set the salary of these positions, otherwise fixed by law.

FLORIDA STATUTES §943.10 (3) and (4) (1985)

943.10 Definitions; ss. 943.085-943.255- The following words and phrases as used in ss. 943.085-943.255 are defined as follows:

(3) "Employing agency" means any agency or unit of governmental or any municipality or the state or any political subdivision thereof which has constitutional or statutory authority to employ or appoint persons as officers .

(4) "Commission" means the Criminal Justice Standards and Training Commission.

FLORIDA STATUTES §27.25(1) (1985)

27.25 State attorney authorized to employ personnel; funding formula-

(1) The state attorney of each judicial circuit is authorized to employ and establish in such number as he shall determine assistant state attorneys, investigators, and clerical, secretarial and other personnel, who shall be paid form funds appropriated for that purpose. The state attorneys of all judicial circuit shall jointly develop a coordinated classification and pay plan which shall be submitted on or before January 1 of each year to the Justice Administrative Commission, the office of the President of Senate, and the office of the Speaker of the House for Representatives. Such plan shall be developed in accordance with policies and procedures of the Executive Office of the Governor established pursuant to §216.181

FLORIDA STATUTES §216.011 (1) (jj) (1985)

216.011 Definitions-

(1) For the purpose of fiscal affairs of the state, appropriations acts, legislative budgets, and approved budges, each of the following terms has the meaning indicated:
(jj) "State agency" or "agency" means any official,m officer, commission, board, authority, council, committee,k or department of the executive branch, or the judicial branch, as herein defined, of the state government.

ARTICLE VI, UNITED STATES CONSTITUTION

ARTICLE VI

This constitution, and the laws of the United States which shall be made in Pursuance therefor: and all Treaties

made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

## FIFTH AMENDMENT,UNITED STATES CONSTITUTION AND FOURTEENTH AMENDMENT UNITED STATES CONSTITUTION

### FIFTH AMENDMENT

NO persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, in in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

### FOURTEENTH AMENDMENT

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the laws.

ARTICLE VIII, SECTION 1 (A) AND 6 (D)
FLORIDA CONSTITUTION

SECTION 1 - Counties-
(g) CHARTER GOVERNMENT. counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law. The charter shall provide which shall prevail in the event of conflict between county and municipal ordinances.

SECTION 6- Schedule to article VIII-
(d) ORDINANCES. Local laws relating only to unincorporated areas of a county on the effective date of this article may be amended or repealed by county ordinance.

FLORIDA STATUTES §768.28 (1) and (2)
(1985)

768.28 Waiver of sovereign immunity in tort actions; recovery limits; limitation on attorney fees; statute of limitation; exclusions.-

(1) In accordance with §13, Art X, State Constitution, the state, for itself and for its agencies or subdivisions, hereby waives sovereign immunity for liability for torts, but only to the extent specified in this act. Actions at law against the state or any of its agencies or subdivisions to recover damages in tort for money damages against the state

or its agencies or subdivisions for injury or loss or property, personal injury, or death caused by the negligent or wrongful act or omission of any employee o the agency or subdivision while acting within the scope of his office or employment under circumstances in which the state or such agency or subdivision, if a private person, would be liable to the claimant, in accordance with the general laws of this state, may be prosecuted subject to the limitations specified in this act. Any such action may be brought in the county where the property in litigation is located or, if the affected agency or subdivision has an office in such county for the transaction of its customary business, where the cause of action accrued.

(2) as used in this act, "state agencies or subdivisions" include the execution departments, the Legislature, the judicial branch (including public defenders), and the independent establishments of the state; counties and municipalities; and corporations primarily action as instrumentalities or agencies of the state, counties or municipalities.

(3)

Supreme Court, U.S.
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No. 89-1188

IN THE
**Supreme Court of the United States**
February Term, 1990

JAMES C. KELLY
*Petitioner,*

v.

S. RAY GILL, ETC., *et al.*
*Respondents.*

# RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

ROBERT A. BUTTERWORTH
Attorney General

LOUIS F. HUBENER
Assistant Attorney General
(Counsel of Record)

DEBORAH J. STEPHENS
Assistant Attorney General

DEPARTMENT OF LEGAL AFFAIRS
The Capitol — Suite 1502
Tallahassee, Florida 32299-1050
(904) 488-9935

ATTORNEYS FOR RESPONDENTS

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§ 112.534, Fla. Stat. . . . . .1

## STATEMENT OF THE CASE

Petitioner filed this action against Respondent Gill in his official capacity only as State Attorney for the Fifth Judicial Circuit. He also filed against the Office of the State Attorney for the Fifth Judicial Circuit. Summary judgment was granted in Respondents' favor as to all counts except one, Petitioner's claim for injunctive relief pursuant to § 112.534, Fla. Stat. Petitioner's other counts were a claim filed pursuant to 42 U.S.C. § 1983, a claim for wrongful termination, and a claim for attorney's fees pursuant to § 57.105, Fla. Stat.

Petitioner filed an appeal to the Fifth District Court of Appeal. Respondents cross appealed. Petitioner, in his reply brief to the appellate court, admitted that sovereign immunity barred his claim filed pursuant to 42 U.S.C § 1983. Thus, the appellate court did not rule on the issue of sovereign immunity. Petitioner argued instead that § 112.532, Fla. Stat., created a property interest in continued employment and that he was denied due process based on a wrongful termination theory.

The appellate court held on June 15, 1989, that absent a statute creating a property interest in employment or contract of employment for a specific duration employment is terminable at will. The court ruled that Petitioner had no employment contract and that there is no common law tort action for wrongful termination cognizable in Florida courts. (J.A. pp. 4-6).

The court further ruled that:

> In the instant case, Kelly has shown no express or implied contract which would remove this factual situation from the "at will" doctrine and contrary to what is alleged on appeal, an individual cannot be wrongfully discharged under an at will doctrine

> solely because that individual was denied some limited statutory procedural right (i.e. § 112.532(4), Fla. Stat. (1985)). A statute cannot create a property interest unless it lists the specific grounds for discharge or states that an employee can only be dismissed for just cause. *Ragucci v. City of Plantation*, 407 So.2d 932 (Fla. 4th DCA 1981). A statutory provision that requires minimal procedural steps prior to termination will not in and of itself create a property interest in continued employment. *Zeigler v. Jackson*, 716 F.2d 847 (11th Cir. 1983). Even assuming that section 112.532(4) affords a law enforcement officer procedural rights, these "reasons" do not invoke the requirement of "just cause" or the requirement of specific grounds for termination. (J.A. pp 5-6).

The court went on to rule that:

> While it is at least arguable that section 112.532(4) offers at least de minimis procedural rights to a "law enforcement officer," Kelly cannot claim a statutory violation because the benefits of section 112.531, et seq., as they relate to dismissal are not available to him. (J.A. p. 7).

The court opined that the fact that Petitioner was called a "law enforcement officer" under § 27.255(1), Fla. Stat., does not mean that he is a law enforcement officer under § 112.531, Fla. Stat.

Petitioner sought review in the Florida Supreme Court on July 19, 1989. This request was denied on October 24, 1989. (J.A. p. 20). Petitioner then filed a petition for relief with this Court.

## SUMMARY OF ARGUMENT

Petitioner admitted in his reply brief that sovereign immunity barred his claim under 42 U.S.C. § 1983. This issue was abandoned by Petitioner and was not considered by the appellate court. To fully comply with the Florida appellate procedure an individual must expressly present his contention of error to the appellate court. Either a failure to object or acquiescence in a matter forecloses review in a state appellate court. *Baker v. Baker*, 394 So.2d 465 (Fla. 4th DCA 1981); *Foley v. State ex rel. Gordon*, 50 So.2d 179 (Fla. 1951). Failure of a petitioner to follow the state appellate process on an issue precludes consideration by this Court of that issue.

In addition, this Court held in *Will v. Michigan Dept. of State Police*, 491 U.S. ____, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), that states and their officials, when sued in their official capacities, are not persons pursuant to 42 U.S.C. § 1983. Also, the Florida Supreme Court has recently held that sovereign immunity bars suits filed in state courts against the state and its officials in their official capacities pursuant to 42 U.S.C. § 1983. *Hill v. Dept of Corrections*, 513 So.2d 129 (Fla. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1024, 98 L.Ed.2d 989 (1988). The court, relying on the federal court rulings, held that the state had not waived its sovereign immunity by implementing § 768.28, Fla. Stat. Absent express language to the contrary or a specific abrogation by Congress, states are considered to be sovereignly immune to suit in their state courts. This argument is also true for the language of § § 112.532 and 943.139, Fla. Stats., which Petitioner also claims waived the state's sovereign immunity.

This Court has held that property interests are created and defined by an independent state law source. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). In

determining if a property interest has been created, federal courts have looked to the language of the state statute, ordinance, or rule. *Zeigler v. Jackson*, 716 F.2d 847 (11th Cir. 1983). Absent language listing specific grounds for discharge or stating that termination can only be for just cause, no property interest is created. Sections 112.532 *et seq.*, Fla. Stat., contain no such language and therefore do not create a property interest.

Petitioner did not raise as an issue in the appellate court the trial court's determination that § 943.139, Fla. Stat., creates no property interest. Thus, this argument was waived. The appellate court neither reviewed this statute nor made a ruling regarding its language. (J.A. pp 1-11). As argued previously, Petitioner cannot now seek to have this Court review this statute. In addition, this provision contains no established rules for dismissal or requirement of termination for just cause. (J.A. p. 30). No due process rights were created.

The appellate court in construing § 112.531 *et seq.*, Fla. Stat., held that the statutes were not applicable to Petitioner or his particular claim. This determination was solely a matter of state statutory construction. The construction, or alleged misconstruction, of a state statute is not sufficient to invoke the review powers of this Court. *King v. West Virginia*, 216 U.S. 92, 101 (1910). These matters are the exclusive responsibility of the state courts. *See Speiser v. Randall*, 357 U.S. 513 (1958).

Petitioner presents no argument in his brief to this Court regarding his request for attorney's fees, which he raised in Question 4 of the Questions Presented. In addition, the appellate court did not rule on petitioner's attorney's fee claim. (J.A. pp. 1-11). Petitioner neither presented nor argued that claim before the court. He cannot raise it now.

The decision by the appellate court in this case conflicts neither with federal law nor with the law of the highest court of another state. Further, the issues presented here have been resolved by this Court or previously presented to this Court and need no further resolution.

## ARGUMENT

In his first argument, Petitioner states that the Fifth District Court of Appeal for the State of Florida (appellate court) ruled that sovereign immunity barred his claim filed pursuant to 42 U.S.C. § 1983. Petitioner alleges that this ruling violates established federal law and is in conflict with another state court of last resort. Petitioner attempts to support this contention by arguing that Florida has waived its sovereign immunity to suits pursuant to 42 U.S.C. § 1983 by virtue of Florida Statutes §§ 768.28 and 112.532(3). (Petition p. 20) Petitioner goes on to argue that the granting of concurrent jurisdiction to state courts for actions under 42 U.S.C. § 1983 as expressed in *Felder v. Casey*, 487 U.S. ____, 108 S.Ct. 2302, 101 L.Ed.2d 123, (1988), and this Court's finding that the supremacy clause preempts the states from implementing *statutes* which limit liability in all claims, prevent a state from determining whether its sovereign immunity is waived for these claims. (Petition p. 19).

A review of the opinion of the appellate court shows that this was not the ruling of that court. The court does not mention sovereign immunity in its opinion and indeed did not decide the claim on that basis. (J.A. pp. 1-11). Petitioner apparently argues that because the trial court ruled on this issue and the appellate court affirmed its ruling, the appellate court, by implication, also ruled on the issue of sovereign immunity. Appellate courts cannot rule on issues by implication. Pursuant to case law regarding Florida's appellate process, an assignment of error must be specifically

raised in the appellate court or it is waived. *Foley v. State ex rel. Gordon*, 50 So.2d 179 (Fla. 1951). Moreover, Petitioner admitted in his reply brief to the appellate court that sovereign immunity barred a claim filed pursuant to 42 U.S.C. § 1983 against a state official in his official capacity.[1]

Petitioner stated:

> Appellate would agree that the Florida Supreme Court has expressly held the doctrine of sovereign immunity prohibits filing of claims pursuant to 42 U.S.C. § 1983 in state courts. (Reply brief p. 3).

Therefore, this argument was not presented to the appellate court for review and that court made no ruling on it. Petitioner abandoned any argument on this issue. Review of this issue by the appellate court was thus foreclosed. *Baker v. Baker*, 394 So.2d 465 (4th DCA 1981). Failure to follow the proper appellate procedure prevents Petitioner from now seeking to revive this argument and present it to this Court for review. *Beck v. Washington*, 369 U.S. 541, 553 (1962). Petitioner has waived review of this issue by this Court. *See Herndon v. Georgia*, 295 U.S. 441 (1935). However, in order to fully respond to Petitioner's argument on this issue respondents will discuss Petitioner's contention that the appellate court impliedly ruled on the sovereign immunity issue by affirming the trial court's grant of summary judgment.

The issue of the state's waiver or nonwaiver of sovereign immunity need not be considered. This Court has recently determined that states and state officials sued in their official capacities for anything other than prospective injunctive relief are not persons for purposes of suits filed

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1 The clear thrust of the Florida Supreme Court's decision in *Hill v. Dept. of Corrections*, 513 So.2d 129, 133 (Fla. 1987), is that the State of Florida has not waived any immunity for a state agency or for a state officer sued in his official capacity.

pursuant to 42 U.S.C. § 1983 when sued in state court. *Will v. Michigan Dept. of State Police*, 491 U.S. ____, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Petitioner sued respondent Gill only in his official capacity as State Attorney for the Fifth Judicial Circuit of Florida and the Office of the State Attorney. This case is on point with *Will* and that decision is controlling. Petitioner did present a claim for injunctive relief in his complaint which was granted by the trial court and denied by the appellate court. The appellate court's decision regarding this claim was based solely on state law grounds, i.e., the applicability of the state statute to Petitioner and to his particular claim. (J.A. pp. 7-8 and p. 11 fn. 5). This request for injunctive relief was not a part of Petitioner's 42 U.S.C. § 1983 claim but was a separate claim. (Petition p. 7). Petitioner had also requested as relief reinstatement. This relief was not granted by the trial court and this denial of relief was not raised on appeal. It was therefore waived. *Foley, supra.*

Further, the issue of whether the State of Florida has waived its sovereign immunity to suits filed pursuant to 42 U.S.C. § 1983 in its courts because of the limited waiver in § 768.28, Fla. Stat., was previously presented to this Court and certiorari was denied. *Hill v. Department of Corrections*, 513 So.2d 129 (Fla. 1987), *cert. denied*, ____ U.S. ____, 108 S.Ct. 1024, 98 L.Ed.2d 989 (1988). The Florida Supreme Court, in *Hill*, held that sovereign immunity was not waived by § 768.28, Fla. Stat. In reaching its decision, the Florida Supreme Court relied on relevant federal case law which held that a waiver of a state's sovereign immunity must be express and cannot be implied. Relying on *Gamble v. Florida Department of Health and Rehabilitative Services*, 779 F.2d 1509 (11th Cir. 1986), the court held that Florida had not waived its immunity to suits pursuant to 42 U.S.C. § 1983 filed in state courts. As with § 768.28, Fla. Stat., § 112.532(3), Fla. Stat., contains no express waiver of sovereign immu-

nity. (J.A. p. 24). Therefore, Petitioner's assertion that this provision waives sovereign immunity must fail.

Petitioner cites *Martinez v. California*, 444 U.S. 277 (1980), and *Felder v. Casey, supra.*, to support his contention that the alleged implied ruling of the appellate court conflicts with established federal law and with the highest court of another state. This reference is inappropriate.

The waiver or nonwaiver of common law sovereign immunity was not the issue in *Martinez*. In *Martinez*, the Court was faced with a challenge to a California statute which granted absolute immunity to a public entity or public employee for any injuries which occurred as a result of the placement of a prisoner on parole. After determining that the statute was constitutional, the Court addressed the statute's application to 42 U.S.C. 1983. The Court held that a *state statute* could not immunize persons acting under color of state law from liability.

In *Felder*, the State of Wisconsin attempted to apply a state notice-of-claim statute to 42 U.S.C. § 1983. The issue again was not one of sovereign immunity. Neither the holding of *Felder* nor the holding of *Martinez* is applicable here. Sovereign immunity is not a protection created by a state statute but is a common law right recognized by this Court. *See Quern v. Jordan*, 440 U.S. 332 (1979); *Will v. Michigan Dept. of State Police*, 491 U.S. ____, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).

Finally, Petitioner cites *Howlett v. Rose*, 545 So.2d 1367 (Fla. 1989), *cert. granted*, ____ U.S. ____, 110 S.Ct. 403, 107 L.Ed.2d 369 (1989), to support his claim that certiorari should be granted in this case. *Howlett* can be distinguished from this case because the entities sued were a county school board and the superintendent of the county schools. The question presented for review in *Howlett* is whether a local county school board and its officials, as opposed to a *state*

agency and a *state* official, could claim immunity from suits pursuant to 42 U.S.C. § 1983 because the state had not waived its immunity.

The decision below is therefore not in conflict with federal law or the law of the highest court of another state. Nor do the questions raised present issues of great importance that have not already been addressed by the Court or need further resolution.

In his second argument, petitioner contends that the appellate court's finding that § 112.531 *et seq.*, Fla. Stat., do not create a property interest and thus trigger no due process rights conflicts with federal law and the decision of another state court of last resort.

This Court has stated that property interests are created by an independent source such as a state statute, rule, or ordinance. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see also Perry v. Sinderman*, 408 U.S. 593, 601 (1972). In determining whether a particular statute, rule, or ordinance has created a property interest, federal courts have looked to state law and reviewed the language of the statute or ordinance. *Zeigler v. Jackson*, 716 F.2d 847 (11th Cir. 1983), citing *Ogletree v. Chester*, 628 F.2d 1366 (11th Cir. 1982), and *McMillian v. City of Hazelhurst*, 620 F.2d 484 (5th Cir. 1980). In *Zeigler*, a case reviewing the language of a Florida statute, the court held that absent established grounds for dismissal or an indication that dismissal can only be for cause, no property interest is created. *Zeigler*, 716 F.2d at 849. Florida Statutes § 112.531 *et seq.*, contain neither established grounds for dismissal nor a provision allowing dismissal only for just cause. No property interest was created by these statutes. Thus, the ruling of the appellate court does not conflict with federal law. Petitioner cites no cases from other states to support his argument of conflict with other state courts of last resort.

Petitioner does, however, cite *Mesa v. Rodriguiez*, 357 So.2d 711 (Fla. 1978), to support his proposition that § 112.531 *et seq.*, Fla. Stat., create some constitutional due process rights. This was not the issue or the holding in *Mesa*. The court, in *Mesa* was requested only to determine the constitutional validity of § 112.531, *et seq.*, Fla. Stat., and their application. Reliance on this case is inappropriate as it is not relevant to the issue presented here. Further, the Florida Supreme Court, expressly adopting the opinion of the Fourth District Court of Appeal in *Migliore v. City of Lauderhill*, 415 So.2d 62 (4th DCA 1982), held that § 112.531 *et seq.*, Fla. Stat., do not create due process rights. *Migliore v. City of Lauderhill*, 431 So.2d 986 (Fla. 1983).

Petitioner also argues that the language of § 943.139, Fla. Stat., creates a property interest in continued employment. This argument was not presented to the appellate court for review and it issued no opinion thereon. (J.A. pp. 1-11). In addition, the provision contains no just cause language or established grounds for dismissal. (J.A. p. 30). Therefore no property interest is created.

Petitioner's third argument is that the appellate court erred in its construction of § 112.531 *et seq.*, Fla. Stat., and by concluding that these sections were not applicable to him. This determination by the appellate court is exclusively the responsibility of the state courts. *See Speiser v. Randall*, 357 U.S. 513 (1958); *see also Garner v. Louisiana*, 368 U.S. 157, 169 (1961). The construction, or in this case, alleged misconstruction of a state statute by a state court is not sufficient grounds to invoke the certiorari jurisdiction of this Court. *King v. West Virginia*, 216 U.S. 92, 101 (1910).

In his fourth argument, petitioner alleges that the appellate court erred by finding that he was not entitled to attorney fees in the trial court. That issue was not addressed by the appellate court because Petitioner did not raise it.

(J.A. pp. 1-11). As stated previously, Petitioner cannot now raise that issue.

## CONCLUSION

The appellate court's decision, on the issue properly presented for its review, is consistent with the laws of this Court and other federal courts in finding that § 112.532 *et seq.*, Fla. Stat., create no property interest which would trigger due process requirements. The remaining questions presented by Petitioner were not properly raised at the appellate court level and cannot now be raised in this Court for review.

Further, the questions presented here have previously been resolved by this Court or other federal courts and need no further resolution. In the absence of decisional conflict, certiorari review should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

LOUIS F. HUBENER
Assistant Attorney General
(Counsel of Record)

DEBORAH J. STEPHENS
Assistant Attorney General

Department of Legal Affairs
The Capitol - Suite 1502
Tallahassee, FL 32399-1050
(904) 488-9935

ATTORNEYS FOR RESPONDENTS

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to JAMES C. KELLY, *Pro Se*, 10135 W. Sunrise Boulevard, Apartment 101, Plantation, Florida 33322, this 21st day of February, 1990.

/s/
LOUIS F. HUBENER